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17 UNITED STATES BANKRUPTCY APPELLATE PANEL

18 OF THE NINTH CIRCUIT

19 In re:

20 JERRY LEE ICENHOWER dba Seaview
21 Properties, and DONNA LEE ICENHOWER,

22 Debtors

23 ALEJANDRO DIAZ-BARBA AND
24 MARTHA MARGARITA BARBA DE LA
25 TORRE,

26 Appellants.

27 v.

28 KISMET ACQUISITION, LLC,

Plaintiff,

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9 **FILED** **FILED**

10 AUG 7 2008

11 AUG 7 2008

12 HAROLD S. MARENUS, CLERK
13 U.S. BKCY. APP. PANEL
14 OF THE NINTH CIRCUIT

15 HAROLD S. MARENUS, CLERK
16 U.S. BKCY. APP. PANEL
17 OF THE NINTH CIRCUIT

18 **'08 CV 1446 BTM BLM**

19 BAP No. SC-08-1198

20 Bankruptcy Court (S.D. Cal.)

21 Case No. 03-11155-LA7

22 Adv. Proc. No.: 06-90369

23 Adv. Proc. No.: 04-90392

24 **EMERGENCY MOTION OF**
25 **DEFENDANTS MARTHA MARGARITA**
26 **BARBA DE LA TORRE AND**
27 **ALEJANDRO DIAZ-BARBA FOR STAY**
28 **OF JUDGMENT PENDING APPEAL**

29 **FILED**

30 AUG 08 2008

31 CLERK, U.S. DISTRICT COURT
32 SOUTHERN DISTRICT OF CALIFORNIA
33 BY *[Signature]* DEPUTY

34 Bankruptcy Case No. 03-11155-LA7
35 Adv. Proc. No. 06-90369; 04-90392

1 TO: THE BANKRUPTCY APPELLATE PANEL AND ALL PARTIES IN INTEREST:

2 1. Appellants Alejandro Diaz-Barba and Martha Margarita Barba de la Torre (the
 3 "Diaz Family"), hereby move the Court, on an emergency basis, pursuant to Federal Rules of
 4 Bankruptcy Procedure 7062 and 8005, for an order:

5 A. Granting a stay of judgment pending appeal in the above Adversary
 6 Proceedings.

7 B. Granting such further relief as the Court deems just and proper.

8 2. On July 30, 2008, the Bankruptcy Court entered its Order on Motion to Alter or
 9 Amend Consolidated Judgment, (the "Order"). A true and correct copy of the Order is attached
 10 as Exhibit 2 to the Appendix, filed concurrently herewith, and the Diaz Family requests that the
 11 Court take judicial notice thereof. The Amended Judgment which is attached as Exhibit A to the
 12 Order, orders the Diaz Family to convey their family vacation home in Mexico to Appellee
 13 Kismet Acquisition LLC, ("Kismet"), for the benefit of the bankruptcy estate within ten days.
 14 Kismet is an entity created by two German property developers solely for the purpose of
 15 acquiring an avoidance action from the Bankruptcy Trustee in the above case.

16 3. On July 31, 2008, the Diaz Family first presented a version of this Motion to the
 17 Bankruptcy Court in accordance with Federal Rule of Bankruptcy Procedure 8005, on an
 18 emergency basis. Kismet's counsel immediately informed the Diaz Family's counsel that it
 19 intended to file an opposition. In accordance with Local Bankruptcy Rule 9014-5(b) governing
 20 the procedure for emergency motions, the Diaz Family's counsel filed a declaration notifying the
 21 Bankruptcy Court that Kismet intended to oppose the Motion. Now, a week later, it has filed no
 22 opposition and the Bankruptcy Court has not ruled on the motion. If the Bankruptcy Court
 23 denies the Motion, the Diaz family will need to then refile it with this Court.

24 4. The ten-day stay of the judgment will expire within one court day—i.e. one
 25 business day, at which time the Diaz Family will risk facing contempt sanctions if it does not
 26 comply with its terms. Accordingly, the Diaz Family is seeking emergency relief from this Court
 27 because it cannot obtain a ruling from both the Bankruptcy Court and, potentially, from this
 28 Court before the stay expires.

1 5. On August 6, 2008, the Diaz Family filed its Notice of Appeal in the Bankruptcy
2 Court in Adversary Proceedings Nos. 04-90392-A7 and 06-90369-A7. A copy of the Notice of
3 Appeal that was filed in both cases is attached as Exhibit B to the Valdez Declaration.

4 6. This motion ("Motion") will be based upon the attached supporting Memorandum
5 of Points and Authorities, the Declaration of Geraldine A. Valdez, the Appendix filed
6 concurrently herewith, and upon such other oral and documentary evidence as the Court may
7 properly consider prior to or at any hearing of this Motion.

8 DATED: August 6, 2008

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25 **FILED** 11:20 a.m.

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 OF THE NINTH CIRCUIT

10 UNITED STATES BANKRUPTCY APPELLATE PANEL

11 OF THE NINTH CIRCUIT

12 In re:

13 BAP No. SC-08-1198

14 JERRY LEE ICENHOWER dba Seaview
 15 Properties, and DONNA LEE ICENHOWER,

16 Debtors

17 Case No. 03-11155-LA7

18 Adv. Proc. No.: 06-90369

19 Adv. Proc. No.: 04-90392

20 ALEJANDRO DIAZ-BARBA;
 21 MARTHA MARGARITA BARBA DE LA TORRE

22 Appellants,
 23 v.
 24 KISMET ACQUISITION, LLC
 25 Appellee.

26 MEMORANDUM OF POINTS AND
 27 AUTHORITIES IN SUPPORT OF
 28 EMERGENCY MOTION OF
 DEFENDANTS MARTHA MARGARITA
 BARBA DE LA TORRE AND
 ALEJANDRO DIAZ-BARBA FOR STAY
 OF JUDGMENT PENDING APPEAL

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Bkr. No. 03-11155-LA7

Adv. Proc. No. 06-90369; 04-90392

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1 Appellants Martha Margarita Barba De La Torre and Alejandro Diaz-Barba ("the Diaz
2 Family") Respectfully Submit Their Memorandum Of Points And Authorities In Support Of
3 Emergency Motion For Stay Of Judgment Pending Appeal, as follows:

I.

INTRODUCTION

6 The purpose of this motion is to request a stay of the judgment herein pending an appeal
7 to be filed by the Diaz Family. This Court has discretion to grant a stay pending appeal and it
8 need not require the posting of a supersedeas bond. As addressed below, a stay is appropriate in
9 this case as the Diaz Family's appeal will raise important issues regarding the subject matter
10 jurisdiction of the bankruptcy court and whether the judgment can stand given its direct impact
11 on real property owned by Mexican citizens in Mexico and Mexico's strong policy against
12 allowing foreign powers to decide issues affecting ownership of real property in Mexico.

13 Absent a stay Alejandro and Martha Diaz, who are Mexican citizens, will suffer
14 irreparable harm as a result of the Court's judgment. They will be forced to convey their
15 Mexican vacation home to Plaintiff, an LLC formed by two German property developers solely
16 for the purpose of acquiring the property by purchasing an avoidance action from the bankruptcy
17 trustee. Additionally, if a stay is not granted, it is likely the Diaz Family's appeal will become
18 moot. Plaintiff will suffer no harm if a stay is granted. The property is protected by an
19 injunction issued by the Bankruptcy Court and the Bankruptcy Court ordered that it be preserved
20 "for the benefit of the estate." Finally, public policy is strongly against the potentially
21 unnecessary forfeiture of homes and disturbance of the status quo.

22 Accordingly, given the significant legal issues in this case, as well as the unique
23 considerations involved when a judgment directly impacts real property located in a foreign
24 country, a stay of the judgment herein is just and proper.

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1 II.
23 **FACTUAL BACKGROUND**
45 **A. The Villa Property**
6

7 In or about 1995, D. Donald Lonie and the D. Donald Lonie, Jr., Family Trust (the "Lonie
8 Creditors") entered into an agreement with Jerry Icenhower ("Icenhower") and Donna Icenhower
9 (collectively, the "Debtors") for the sale of their interest in a piece of coastal real property in
10 Mexico called the Villa Vista Hermosa (the "Villa Property"). The Villa Property is located in
11 the village of Chamelea in the Municipality of La Huerta, State of Jalisco, Mexico. *See*, Appendix
12 Exh. 1, Consolidated Findings of Fact and Conclusions of Law ("FF&CL") entered on June 2,
13 2008 at ¶3.¹ Under Mexican law, a foreign national may not directly hold title to coastal real
14 property in Mexico, but may lease or acquire rights of use on such property by forming a
15 *fideicomiso* bank trust to hold title to the real property. Therefore, the Lonie Creditors sold only
16 a leasehold interest or right of use to the Villa Property to the Debtors (the "Villa Property
17 Interest"). *Id.* at ¶3, fn. 4.

18 In return, the Debtors executed two promissory notes in favor the Lonie Creditors, who
19 recorded a lien to secure the note. Subsequently, the Lonie Creditors agreed to release the lien to
20 enable the Debtors to sell the Villa Property Interest to a third party. The sale fell through and a
21 dispute arose between the Debtors and the Lonie Creditors. *Id.* at ¶4.

22 On March 24, 2000, the Lonie Creditors commenced an action against the Debtors in the
23 United States District Court for the Southern District of California (the "District Court
24 Litigation"). *Id.* at ¶4. On March 4, 2002, the Debtors purchased a Nevada corporation, H&G,
25 and transferred their Villa Property Interest to that entity. *Id.* at ¶8.

26 **B. Icenhower Induces Diaz To Purchase The Villa Property**
27

28 Defendant Alejandro Diaz ("Diaz"), a citizen of Mexico, first met Debtor Jerry Icenhower
29 through a childhood friend, Eugene Kocherga. Kocherga's family formerly owned the Vista
Property and Diaz and Kocherga had spent many summers there together. *Id.* at ¶27.

¹ The references to the Appendix/docket refer to Adversary Proceeding #04-90392. The Diaz Family's appeal will also include Adversary Proceeding #06-90369-LA.

1 In 2003, Kocherga was planning his wedding and was determined to get married in his
 2 childhood home. He made some inquiries to determine the new owner of the Villa Property to
 3 see if they would agree to allow him to hold his wedding there. He was introduced to Debtor
 4 Jerry Icenhower ("Icenhower") who told him that he was managing the Villa Property. *Id.*

5 As Kocherga was making preparations to rent the Villa Property, he had several meetings
 6 with Icenhower. During one of these meetings in San Diego, Kocherga introduced Diaz to
 7 Icenhower. Later Kocherga and Diaz visited the Villa Property together and Diaz met Icenhower
 8 again. Diaz remembered the Villa Property fondly and found it even nicer than he remembered.
 9 Icenhower mentioned that the house was possibly for sale at a selling price of \$3 million dollars.
 10 Diaz indicated that he was interested in the house, but not at that price. *Id.* at ¶¶27-28.

11 After the wedding, Icenhower contacted Diaz several times to ask him if he was still
 12 interested in purchasing the Villa Property. He told Diaz that he was only managing the house
 13 for H&G which, he said, comprised of a group of investors from Nevada. Icenhower dropped the
 14 asking price a little each time he spoke with Diaz. Finally, he advised Diaz that the lowest price
 15 H&G would accept for the Villa Property Interest was \$1.5 million. Diaz informed his mother,
 16 Defendant Martha Diaz ("Mrs. Diaz") of this opportunity to purchase the Villa Property. Mrs.
 17 Diaz agreed to become a co-owner with Diaz. Diaz told Icenhower that he was interested in
 18 purchasing the Villa Property for \$1.5 million and made a check out to H&G for \$25,000.00 as a
 19 sign of good faith. *Id.* at ¶¶29 & 39. Diaz then requested his friend and attorney/notary, Mr.
 20 Eduardo Sanchez Acosta ("Sanchez") to start the legal process and necessary due diligence to
 21 purchase the Villa Property.

22 On November 24, 2003, the district court entered judgment in favor of the Lonie
 23 Creditors in the District Court Litigation. On December 15, 2003, the Debtors filed for
 24 protection under chapter 7 of the Bankruptcy Code. *Id.* at ¶5. Gerald H. Davis was appointed
 25 as trustee (the "Trustee"). Shortly thereafter, Diaz received a notice from the Bankruptcy Court
 26 informing him that Icenhower had filed for bankruptcy and that he was listed as a creditor on
 27 account of his \$100,000 loan. The Lonie Creditors were also listed as creditors. *Id.* at ¶31.

28

1 Alarmed, Diaz called Icenhower to inquire about the bankruptcy. Icenhower explained
 2 that he and the Lonie Creditors were in a dispute over a big land development project in
 3 Ensenada, Mexico. The Lonie Creditors wanted to collect on a note that Icenhower assured Diaz
 4 was already liquidated. Diaz asked if the Villa Property was involved in this dispute. Icenhower
 5 assured him that he had sold it long before the dispute had arisen and that it was not involved in
 6 the bankruptcy. *Id.* at ¶32.

7 C. The Diaz Family Completes Its Due Diligence And Purchases The Villa
 8 Property

9 By August of 2004, Sanchez had completed eight months of due diligence and presented
 10 Diaz with a report certifying his findings that there were no outstanding liens on the Villa
 11 Property. The report indicated that Icenhower had formerly owned the Villa Property but that he
 12 had transferred it to H&G two years earlier. The report also showed that H&G was a corporation
 13 in good standing and that a Craig Kelley was its chief officer. *Id.* at ¶334.

14 Diaz received the additional assurances that are provided for under Mexican law that the
 15 Villa Property was free and clear of any liens and encumbrances. Under Mexican law, a seller or
 16 buyer of real property is required to obtain a certificate from the Public Registry of Property,
 17 stating who the owner of the property is and if the property is free of any lien or deed affecting
 18 the free disposition of the land. Only after the Public Registry of Property certifies that the seller
 19 is the actual owner and that the property is free of liens and claims, will a Public Notary attest
 20 and certify, through a deed, the sale/purchase of the property. Once the process is finished, the
 21 Notary Public sends the final deed to the Public Registry for registration. Once the sale is duly
 22 recorded, a certified formal deed is delivered to the buyer. All liens or claims must be registered
 23 with the Mexican government to have any effect, and a notary's certification of no liens is
 24 considered a final and conclusive finding.

25 With respect to Diaz's purchase of the Villa Property, the Public Registry of Property and
 26 the Notary Public, Attorney Felipe Vazquez Alda  , confirmed that the owner of the Villa
 27 Property Interest was H&G and had been so for two years. They also confirmed that H&G was
 28 current with its obligations.

1 Accordingly, on or about June 7, 2004, Diaz and H&G closed the sale of the Villa
 2 Property. Upon Icenhower's instruction, Diaz transferred the purchase price for the property to
 3 the following third-party entities: (1) \$675,000 to Buckeye International Funding, Inc.; (2)
 4 \$398,663 to Western Financial Assets, Inc. and (3) \$191,567 to Icenhower Investments, via a
 5 bank account controlled by Icenhower's brother, Hobart Icenhower. *Id.* at ¶¶37-39.

6 Diaz obtained legal title to the Villa Property by an Escritura dated August 5, 2004 (the
 7 "Diaz Escritura"). Accordingly, Diaz did not merely obtain an assignment of the beneficial
 8 interest in the fideicomiso trust from H&G. Therefore, because Diaz and Mrs. Diaz are Mexican
 9 citizens, they may hold legal title to the Villa Property. The Banco Nacional de Mexico, S.A.
 10 subsequently conveyed legal title to the Villa Property directly to Diaz and Mrs. Diaz and the
 11 fideicomiso trust was dissolved and terminated.

12 The Diaz Family paid approximately \$1.4 million for the Villa Property. Diaz believes
 13 that the property was worth not more than \$1.4 million when he and his mother purchased the
 14 property in August of 2004. *Id.* at ¶39. His opinion is based on an appraisal obtained by him and
 15 an appraisal commissioned by the Trustee with his cooperation. The Trustee's appraiser
 16 concluded that the Villa Property was worth \$1,284,209 as of September 13, 2004.

17 **D. The Avoidance Actions**

18 On August 23, 2004, The Trustee commenced a fraudulent conveyance action against
 19 H&G to avoid and recover the Debtors' transfer of their Villa Property Interest to H&G. At the
 20 time, the Trustee was unaware of the subsequent transfer of the Villa Property to the Diaz
 21 Family. *Id.* at ¶44. In February 2005, upon learning of the transfer, the Trustee amended the
 22 complaint to add the Diaz Family and also obtained injunctive relief restraining the Diaz Family
 23 from transferring or encumbering the Villa Property. *Id.* at ¶45.

24 On August 3, 2006, the Trustee filed a second action against H&G and the Icenhowers
 25 seeking a determination that (1) H&G was the alter ego of the Debtors; and (2) to substantively
 26 consolidate the Debtors and H&G *nunc pro tunc* to the date of filing of the bankruptcy petition
 27 (the August 23, 2004 action and the August 3, 2006 actions are collectively referred to as the
 28 "Avoidance Actions"). *Id.* at ¶48.

1 **E. The Kismet Plaintiffs Enter The Picture**

2 While the Icenhower bankruptcy was proceeding in the United States, two businessmen,
 3 Wolfgang Hahn and Dieter Hahn (the "Hahn Brothers"), purchased a majority shareholder
 4 interest in a Mexican Real Estate Company "Impulsora de Chamela" ("IC"). IC owned more
 5 than 350 hectares of land that completely surrounds the Villa Property. Through IC, the Hahn
 6 Brothers were developing a golf resort project in Mexico called "Tambora". When completed,
 7 Tambora will surround the Villa Property, with Holes 2 through 5 of the golf course wrapping
 8 around the property on the hill. Accordingly, the Villa Property was of tremendous strategic
 9 value to the Hahn Brothers and they desperately wanted to obtain it. However, the Villa Property
 10 was the Diaz Family's vacation home. As such, it had great sentimental value. Therefore, Diaz
 11 and his mother were unwilling to sell.

12 The Hahn Brothers were not going to give up that easily. They were looking for a way to
 13 out-maneuver Diaz and find an alternate mechanism to seize the Villa Property from the Diaz
 14 Family. Then by a stroke of luck, Diaz informed the Hahn Brothers of the Lonie Creditors'
 15 claims against the Icenhowers, the bankruptcy and, most significantly, the existence of the
 16 Avoidance Actions. By virtue of Diaz's good faith disclosures, these two German citizens came
 17 up with a scheme to use the United States Bankruptcy Court to accomplish their goal to wrest a
 18 home located in Mexico from its reluctant Mexican citizen owner.

19 In July 2006, because the Hahn Brothers were not U.S. citizens, they set up two shell
 20 Delaware corporations, Kismet Acquisitions, LLC and Kismet Acquisitions II, LLC (the "Kismet
 21 Plaintiffs"), solely for the purpose of acquiring and prosecuting the Trustee's avoidance actions
 22 against the Diaz Family. First, they convinced the Lonies to sell Kismet Acquisition LLC their
 23 \$1,385,950.65 claim arising from the district court litigation. Next, they entered into an
 24 agreement with the Trustee on behalf of the Kismet Plaintiffs, to purchase the Avoidance Actions
 25 (the "Purchase & Assignment Agreement"). In return for the Avoidance Actions, Kismet agreed
 26 to pay an amount sufficient to pay all creditors in full, except for the Kismet Plaintiffs' claim,
 27 which it agreed to subordinate that claim to those of the other creditors. On December 7, 2006,
 28 the Court entered an order approving the Purchase & Assignment Agreement.

F. Pre-Trial Rulings And The Judgment

On November 29, 2006, the Diaz Family filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim or, in the Alternative, to Abstain. See Docket # 183-187. The basis for the motion was the Bankruptcy Court's lack of subject matter jurisdiction to determine real property rights in Mexico and the strong policy considerations involved in deciding issues related to Mexican real property which require abstention on the grounds of international comity. On February 13, 2007, the Bankruptcy Court issued its order denying the Diaz Defendant's challenge of subject matter jurisdiction. See Appendix, Exh. 5, Order dated February 13, 2007.

10 On April 21, 2008, the Bankruptcy Court conducted a four-day bench trial of the
11 Avoidance Actions. On June 2, 2008, the Bankruptcy Court entered judgment in favor of the
12 Diaz Family and its Findings of Fact and Conclusions of Law in support of the Judgment. See
13 Appendix, Exh. 4. Preliminarily, the Bankruptcy Court found that the Kismet Plaintiffs are
14 entitled to Judgment on its claims and the alter ego-avoidance action. Further, according to the
15 Bankruptcy Court's judgment, the Villa Property is property of the estate thereby permitting the
16 Bankruptcy Court to rule that the transfer to the Diaz Family is avoidable under 11 U.S.C. § 549
17 as an unauthorized post petition transfer. *See*, FF&CL, Appendix, Exhibit 4, at ¶¶ 80-83. The
18 Bankruptcy Court went on to rule that alternatively, the Kismet Plaintiffs are entitled to judgment
19 on their fraudulent conveyance action in that the Debtors' transfer of the Villa Property to H&G
20 is avoidable under 11 U.S.C. § 544(A), pursuant to California law and that recovery of the Villa
21 Property from the Diaz Family is permitted pursuant to 11 U.S.C. § 550(A)(2). *Id.* at pp. 26-33.

22 As indicated in the Bankruptcy Court's Amended Consolidated Judgment, the Bankruptcy
23 Court provided the Kismet Plaintiffs, at their sole option, the following remedies:

* * *

25 (e) Plaintiff is entitled to recover and preserve pursuant to 11 U.S.C. §
26 550(a)(1) and § 551 the Villa Property from the Diaz Defendants as the initial
27 transferees of the avoided postpetition transfer. Within ten days of entry of this
28 judgment, Defendants are hereby ordered and directed to take all actions necessary
to execute and deliver any and all documents needed to undo the avoided transfer,
and to take all actions necessary to cause the property to be reconveyed to a
fideicomiso trust naming Plaintiff as the sole beneficiary for the benefit of the
bankruptcy estate; or

1
2 (f) Alternatively, at Plaintiff's sole option made upon proper noticed motion,
3 the Court reserves jurisdiction to enter a monetary judgment in favor of Kismet,
4 and against Defendants, in an amount necessary to make the estate whole at the
5 time of judgment.

6 2. Alternatively, even if the Villa Property is not property of the bankruptcy
7 estate *nunc pro tunc* to the petition date, judgment is entered in favor of
8 Plaintiff and against the Defendants on the remaining claims in the
9 amended complaint in adversary proceeding 04-90392. It is hereby
10 adjudged and decreed that –

11 * * *

12 Plaintiff is entitled to recover and preserve pursuant to 11 U.S.C. §§ 550(a)(1) and
13 (a)(2) and § 551 the avoided fraudulent transfer from H&G as the initial transferee
14 of the avoided fraudulent transfer, and from the Diaz Defendants as the
15 "immediate or mediate" transferees of the initial transferee. Within ten days of
16 entry of this judgment, Defendants are hereby ordered and directed and execute
17 and deliver any and all documents needed to undo the avoided transfer, and to take
18 all actions necessary to cause the property to be reconveyed to a *fideicomiso* trust
19 naming Plaintiff as the sole beneficiary for the benefit of the bankruptcy estate;

20 (b) alternatively, at Plaintiff's sole option made upon proper noticed
21 motion, the Court retains jurisdiction to enter a monetary judgment in
22 favor of Kismet, and against Defendants, in an amount necessary to make
23 the estate whole at the time of judgment.

24 3. The Court reserves for future determination made upon proper motion the issues
25 of an award of fees and expenses, and it reserves jurisdiction to issue any and all orders necessary
26 to carry out and enforce this judgment.

27 See Appendix, Exhibit 6, Amended Consolidated Judgment dated July 30, 2007, Exhibit A.

28 **III.**

29 **THE DIAZ FAMILY IS ENTITLED TO A**
DISCRETIONARY STAY WITHOUT A BOND

30 Federal Rules of Procedure 7062 and 8005 establish the procedure to be followed by an
31 appellant seeking to stay a judgment of the bankruptcy court. Bankruptcy Rule 7062 provides
32 that Federal Rule of Civil Procedure Rule 62 is applicable in adversary proceedings, and
33 Bankruptcy Rule 8005 enables the bankruptcy court and the district court to tailor relief to the
34 unique circumstances of the case, "[n]otwithstanding Rule 7062," by making any "appropriate
35 order during the pendency of an appeal on such terms as will protect the rights of all parties in
36 interest." *In re Trans World Airlines, Inc.*, 18 F.3d 208, 212 (3rd Cir. 1994). The court has
37

1 discretion to grant a stay pending appeal under Bankruptcy Rules 8005 and 7062 and it need not
 2 require the posting of a supersedeas bond. *In re Suprema Specialties, Inc.*, 330 B.R. 93, 96
 3 (S.D.N.Y.2005) ("the posting of a bond ... is discretionary and is not a prerequisite to obtain a
 4 stay pending appeal.").

5 In order to determine whether a stay pending appeal is appropriate, the court examines (1)
 6 whether the applicant has established that it is likely to succeed on the merits; (2) whether the
 7 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will
 8 substantially injure the other parties in interest; and (4) where the public interest lies. *Hilton v.*
 9 *Braunskill*, 481 U.S. 770, 776 (1987); *In re Wymer*, 5 B.R. 802, 806 (9th Cir. 1980); *Schwartz v.*
 10 *Covington*, 341 F.2d 537 (9th Cir. 1965). Even if a party fails to show a likelihood of success on
 11 appeal, the applicant is still entitled to a stay if the applicant makes a strong showing on the other
 12 factors. See *Thomas v. City of Evanston*, 636 F.Supp. 587, 590-91 (1986).

13 In this case, the Diaz Family can satisfy these elements. The Diaz Family will likely
 14 succeed on the merits of the appeal. However, even if the Court disagrees that it cannot satisfy
 15 the "likelihood of success" prong, the Diaz Family can make such a strong showing on the other
 16 factors that the Court should grant this motion. The Diaz Family will suffer irreparable injury if
 17 it is forced to relinquish their home, which could potentially deprive them of its appellate rights
 18 altogether by mooting the appeal. The issuance of the stay would not substantially injure the
 19 Kismet Plaintiffs and the stay would be in the public interest. Accordingly, the Court should
 20 issue a stay pending appeal of the Judgment.

21 A. The Diaz Family Will Likely Succeed On The Merits

22 Likelihood of success is not certainty of success. *In re Forty Eight Insulations, Inc.*, 115
 23 F.3d 1294, 1301 (7th Cir. 1997) (citing *Michigan Coalition of Radioactive Material Users, Inc. v.*
 24 *Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).) The necessary "level" or "degree" of
 25 possibility of success will vary according to the court's assessment of the other stay factors.
 26 *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002). The requisite showing of substantial
 27 possibility of success is inversely proportional to the amount of irreparable injury defendants will
 28 suffer absent the stay. *Id.* (quoting *Michigan Coalition of Radioactive Material Users*, 945 F.3d

1 at 153.) The movant need not always show a 'probability of success' on the merits; instead, the
 2 movant need only present a substantial case on the merits when a serious legal question is
 3 involved and show that the balance of the equities weighs heavily in favor of granting the stay."
 4 *LaRouche v. Kezer*, 20 F.3d 68, 72-73 (2d Cir. 1994).

5 Applying these standards, the Diaz Family is likely to succeed on the merits.

6 1. Standards of Review

7 Generally, all decisions by the court regarding the interpretation or application of law to a
 8 given dispute are reviewed *de novo*. *United States v. Middleton*, 231 F.3d 1207, 1209 (9th Cir.
 9 2000); *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 573 (9th Cir. 1995), aff'd 517 US 830, 116 S.Ct.
 10 1813 (1996). This includes a court's interpretation of foreign law. *Brady v. Brown*, 51 F.3d 810,
 11 816 (9th Cir. 1995). Furthermore, a court's findings of fact relevant to subject matter jurisdiction
 12 must be accepted on appeal unless clearly erroneous. However, the existence of subject matter
 13 jurisdiction is reviewed *de novo*. *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 323-324 (9th
 14 Cir. 1996). A court's decision to extend or deny comity to a foreign proceeding is reviewed for
 15 abuse of discretion. See *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2nd Cir.
 16 1993). As discussed below, the Diaz Family disagrees with this Court's legal conclusion that that
 17 Mexican Calvo Clause is inapplicable to this case and that this Court has the requisite subject
 18 matter jurisdiction to render a judgment that affects real property in Mexico. Among other
 19 things, including whether substantial evidence supports the findings of the Bankruptcy Court, the
 20 appeal in this case will address as a matter of law whether the judgment in this case is contrary to
 21 the exclusive sovereignty of Mexico over its realty and therefore void.

22 2. This Court Lacks Subject Matter Jurisdiction to Determine Real
 23 Property Rights in Mexico.

24 The judgment in this case strips Mexican citizens (the Diaz Family) of their title to their
 25 real property in Mexico and orders them to execute the necessary conveyance documents
 26 transferring real property in Mexico to someone else. The United States courts have long
 27 respected the sovereignty of foreign nations and have long held that courts in the United States
 28

1 lack the subject matter jurisdiction to effect change of ownership of real property located in
2 foreign countries.

(a) Title to Real Property Can only Be Decided by a Court in the Jurisdiction Where the Property is Located.

5 For nearly two hundred years, the Supreme Court has firmly held that issues affecting title
6 to real property are "local actions" and can be decided only by a court in the jurisdiction where
7 the real property is located. This fundamental principle of law was first established in the United
8 States in *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411).² Following
9 *Livingston*, the Supreme Court has consistently recognized that a local action must be brought
10 within the state where the land is located. See, e.g., *Louisville & N.R.R. v. Western Union*
11 *Telegraph Co.*, 234 U.S. 369 (1914); *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107
12 (1895); *Casey v. Adams*, 102 U.S. (12 Otto) 66, 67-68 (1880).

13 As the Supreme Court stated in *Casey v. Adams*, " [t]he distinction between local and
14 transitory actions is as old as actions themselves . . . Local actions are in the nature of suits in
15 rem, and are to be prosecuted where the thing on which they are founded is situated." *Casey v.*
16 *Adams*, 102 U.S. at 67-68. Indeed, the local action rule is so fundamental that state courts are not
17 obligated to give full faith and credit to judgments from either federal or state courts sitting
18 outside the local state's territorial boundaries. See *Clarke v. Clarke*, 178 U.S. 186, 190 (1900)
19 (Connecticut courts are not required to give full faith and credit to a judgment of the South
20 Carolina Supreme Court concerning the construction of a will which affected the passing of title
21 to land situated in Connecticut).

(b) U.S. Courts Particularly Lack Jurisdiction to Determine Real Property Rights in Foreign Countries.

24 The Supreme Court has expressly held that U.S. Courts in general, and bankruptcy courts
25 in particular, do not have jurisdiction to determine property rights in foreign countries. In the
26 case of *Oakey v. Bennett*, 52 U.S. 33 (1850), the Supreme Court held that the bankruptcy court in

²⁸ ² The local action doctrine is much older and dates back at least seven hundred years to the Court of Common Pleas in England in the thirteenth century. *Keller v. Malice*, 838 F.Supp. 1163, 1169 n. 1 (D. S.D. Tex. 1993).

1 the United States had no jurisdiction to convey real property located in another country. *Id.* at
 2 44-45. The Supreme Court stated:

3 A statutable conveyance of property cannot strictly operate beyond the local
 4 jurisdiction. Any effect which may be given to it beyond this does not depend
 5 upon international law, but the principle of comity; and national comity does not
 require any government to give effect to such assignment, when it shall impair the
 remedies or lessen the securities of its own citizens.

6 *Id.* at 44. The Supreme Court further noted that foreign assignments of real property located in
 7 the United States are not recognized in this country and that a proceeding in rem against the
 8 property of a foreign bankrupt, under U.S. law may be maintained by creditors notwithstanding
 9 the foreign assignment. *Id.* at 44. The Supreme Court emphasized that no country may
 10 determine property rights of real property located in other countries. In this regard, the Court
 11 stated:

12 It is believed that no sovereignty has, at any time, assumed the power, by
 13 legislation or otherwise, to regulate the distribution or conveyance of real estate in
 14 a foreign government. There is no pretence that this government, through the
 15 agency of a bankruptcy law, could subject the real property in Texas, or in any
 other foreign government, to the payment of debts. This can only be done by the
 laws of the sovereignty where such property may be situated.
Id. at 45.

16 Other courts have likewise held that U.S. courts have no jurisdiction to determine
 17 property rights with regard to real property located in foreign countries. In the case of *Holt v.*
 18 *Guerguin*, 163 S.W. 10 (1914), the Supreme Court of Texas addressed the issue of whether a
 19 court in Texas had the power to annul deeds to property located in Mexico. In that case, the
 20 grantors, both deceased, had executed a deed to real property located in Mexico to their daughter.
 21 The lower court annulled the deed on the grounds of fraud and undue influence. The Texas
 22 Supreme Court reversed on the grounds that the court lacked jurisdiction to affect title to land
 23 located in Mexico. The court stated:

24 We are of opinion that so far as the decree in this case sets aside and annuls the
 25 deed to the land in the Republic of Mexico it is void, because the District Court
 26 had not jurisdiction of the subject matter; the court of Texas could not acquire
 jurisdiction of land beyond its borders. (Citations omitted.)

27 The District Court at San Antonio also appointed commissioners and directed
 28 them to partition the land between the plaintiffs and defendants. That portion of
 the decree is likewise void because the courts of this State have no power or
 authority over land in Mexico.

1 *Id.* at 12. The issue was similarly addressed in the case of *Griner v. Trevino*, 207 S.W. 947, 949-
 2 50 (Tex. Civ. App. 1918). In that case, the parties entered into a 20-year contract for cutting
 3 certain plants from the plaintiff's land located in Mexico. The plaintiff sought a judgment
 4 canceling the contract on the basis of fraud. The lower court entered a judgment canceling the
 5 contract. *Id.* at 948. The Court of Appeal reversed. The Court of Appeal held that the lower
 6 court did not have jurisdiction to cancel the contract because it was a determination of property
 7 rights in a foreign country. The court noted:

8 [...]t may be premised that real property is subject to the exclusive jurisdiction of
 9 the courts of the state or country in which it is located. No other courts may
 10 properly exercise any jurisdiction over it, and this is as true of courts of equity as
 11 of courts of law.

12 *Id.* at 950 (quoting Wharton, Conflict of Laws).

13 This issue was addressed more recently in the case of *Mann v. Hanil Bank*, 900 F.Supp.
 14 1077 (D. E.D. WI 1995). In that case, the plaintiffs sought an order compelling Korean banks to
 15 liquidate certain real property collateral located in Korea. The Korean banks defended on the
 16 grounds that the court lacked jurisdiction to order the sale of land in a foreign country. The Court
 17 agreed. Citing the case of *Livingston v. Jefferson*, the court held that it was without jurisdiction
 18 to order the sale of land in a foreign country. *Id.* at 1094-95.

19 The prohibition on the determination of property rights in foreign countries has as much
 20 vitality today as it did when the *Oakey* case was decided. In 1984, Justice Scalia, sitting on the
 21 Court of Appeals for the District of Columbia, addressed the issue in the case of *Asociacion De
 22 Reclamantes, v. United Mexican States*, 735 F.2d 1517 (DC Cir. 1984). In that case, Justice
 23 Scalia addressed the exceptions to sovereign immunity for actions regarding title to real property.
 24 Justice Scalia wrote:

25 The origin of the traditional exception limited to questions involving property
 26 interests or possession is self-evident. A territorial sovereign has a primeval
 27 interest in resolving all disputes over use or right to use of real property within its
 28 own domain. As romantically expressed in an early treatise:

29 A sovereignty cannot safely permit the title to its land to be determined by a
 30 foreign power. Each state has its fundamental policy as to the tenure of land; a
 31 policy wrought up in its history, familiar to its population, incorporated with its
 32 institutions, suitable to its soil.

(Citation omitted.) A subsidiary concern, less instinctive and mystical, is that courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation These considerations produced not only the exception to sovereign immunity we are here discussing, but also the "local action rule," which makes the locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate. *Griner v. Trevino*, 207 S.W. 947, 949-50 (Tex. Civ. App. 1918). (735 F.2d at 1521.)

The *Griner v. Trevino* decision cited by Justice Scalia (discussed above) was a case in which a court in Texas held that U.S. courts lacked subject matter jurisdiction to determine real property rights in Mexico.

3. The Bankruptcy Code Avoidance Sections Do Not Apply Extraterritorially.

It is a long-settled principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Equal Employment Opportunity Comm. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("Aramco"); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *In re Maxwell Commc'n Corp.*, 170 B.R. 800, 809 (S.D.N.Y. 1994). The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)). Moreover, the presumption recognizes that Congress is primarily concerned with domestic conditions when it legislates. *Aramco*, 499 U.S. at 43 (citing *Foley Bros., Inc.*, 336 U.S. at 285).

An act of Congress will not be found to apply to conduct occurring outside the U.S. unless "the affirmative intention of the Congress" to apply the law extraterritorially is "clearly expressed" in the statute. *Aramco*, 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). If the legislative purpose is not "unmistakably clear," see *Labor Union of Pico Korea v. Pico Products*, 968 F.2d 191, 195 (2d Cir.) (1992), any ambiguity in the statute must be resolved in favor of refusing to apply the law to events occurring outside U.S. territory. See *Aramco*, 499 U.S. at 253 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").

1 At least two courts have expressly held that Congress did not intend for the Bankruptcy
 2 Code avoidance sections to apply extraterritorially. In the case of *In re Maxwell Communication*
 3 *Corporation*, 186 B.R. 807 (D. S.D.N.Y 1995), the District Court for the Southern District of
 4 New York held that Congress did not intend for Bankruptcy Code section 547 to apply
 5 extraterritorially. In *Maxwell*, an examiner had brought preference actions against foreign banks
 6 to avoid certain transfers of funds. The defendant banks brought a motion under Federal Rule
 7 12(b)(6) for dismissal for failure to state a claim on which relief can be granted. The District
 8 Court granted the motion and dismissed the claims on the grounds that Bankruptcy Code section
 9 547 was inapplicable because Congress did not intend the statute to apply to transfers occurring
 10 outside the United States.

11 The *Maxwell* Court conducted an extensive analysis of the issue of Congressional intent
 12 with regard to the Bankruptcy Code in general and Section 547 in particular. The *Maxwell* Court
 13 found that nothing in the language or legislative history of section 547 expresses Congress' intent
 14 to apply the statute to foreign transfers. The Court stated:

15 The Supreme Court has stated that "when it desires to do so, Congress knows how
 16 to place the high seas within the jurisdictional reach of a statute." *Argentine*
Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440, 102 L. Ed. 2d 818,
 17 109 S. Ct. 683 (1989). Because Congress has not "clearly expressed" its desire
 18 that § 547 govern extraterritorial conduct, see *Aramco*, 499 U.S. at 248, that
 section cannot apply to the foreign transfers at issue in this case.

19 *Id.* at 821.

20 The issue of the extraterritorial effect of the Bankruptcy Code avoidance sections was
 21 also addressed in *Barclay v. Swiss Finance Corporation Limited (In re Midland Euro Exchange*
 22 *et al)*, 347 B.R. 708 (Bankr. C.D. Cal. 2006), a case from the United States Bankruptcy Court for
 23 the Central District of California, wherein Judge Mund held that Congress did not intend
 24 Bankruptcy Code Section 548 to apply extraterritorially. In that case, a chapter 7 Trustee brought
 25 an action under Bankruptcy Code section 548 to set aside and recover allegedly fraudulent
 26 transfers paid by the debtor in fees and commissions to a foreign exchange brokerage. The
 27 Trustee filed a complaint pleading two claims for relief under Bankruptcy Code sections
 28 548(a)(1)(A) and 550(a) and seeking to recover the fees as fraudulent transfers. The defendant

1 filed a motion under Rule 12(b)(6) to dismiss the complaint for failure to state a claim for relief.
 2 The motion also argued that Congress did not intend Bankruptcy Code section 548 to apply
 3 extraterritorially and that the Court should abstain from exercising jurisdiction on the grounds of
 4 international comity.

5 After extensive analysis, the *Midland Euro Exchange* Court found that nothing in the text
 6 of Section 548 or other sections of the Bankruptcy Code indicate congressional intent to apply
 7 Section 548 extraterritorially. *Id.* at 717. Judge Mund acknowledged that policy considerations
 8 favor extraterritorial application of Section 548 because failure to extend application of Section
 9 548 to transfers outside the territorial borders of the United States creates a loophole for
 10 unscrupulous debtors to freely transfer their assets to shell entities abroad and avoid the reach of
 11 the Bankruptcy Code. *Id.* at 718. However, the Court recognized that, in the Ninth Circuit,
 12 policy considerations are insufficient to overcome the presumption against extraterritorial
 13 application of U.S. statutes.

14 These policy considerations, however, must be balanced against the presumption
 15 against extraterritoriality, which serves to protect against unintended clashes
 16 between our laws and those of other nations which could result in international
 17 discord. See *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.
 18 Ct. 1227, 113 L. Ed. 2d 274 (1991). The Ninth Circuit has held that policy
 19 considerations alone are insufficient to overcome the presumption against
 extraterritoriality. See *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24
 F.3d 1088, 1096 (9th Cir. 1994) (en banc) (" . . . the ultimate touchstone of
 extraterritoriality consist[s] of an ascertainment of congressional intent; courts
 [do] not rest solely on the consequences of a failure to give a statutory scheme
 extraterritorial application.").

20 *Id.* at 718. The *Midland Euro Exchange* Court, having found no evidence of congressional intent
 21 to extend the application of Section 548 extraterritorially, held that the trustee could not pursue
 22 his claims under that statute. Judge Mund dismissed the claims under Rule 12(b)(6) on the
 23 grounds that the trustee had failed to state a claim on which relief could be granted.

24 In the case of *In re French*, 440 F.3d 145 (4th Cir. 2006) the Fourth Circuit Court of
 25 Appeal applied Section 548 extraterritorially to avoid a transfer of real property located in a
 26 foreign country. However, this case has been criticized as a rogue decision which is poorly
 27 reasoned. In declining to follow *In re French*, Judge Mund stated:

28

1 *In re French* totally ignores § 541(a)(3) and uses an unclear and convoluted
 2 method to reach its conclusion. I have a great deal of trouble following the Fourth
 3 Circuit's reasoning and am not persuaded that it leads to the proper conclusion.

3 *Id.* at 719.

4 Similarly, here, the analysis is the same as the extraterritoriality of sections 547 and 548.
 5 Just as with sections 547 and 548, there is no evidence of congressional intent to extend the
 6 application of Section 544(b) extraterritorially. There is no such intent expressed in section
 7 544(b) itself.³ Nor is counsel for the moving party aware of anything in the Bankruptcy Code or
 8 the legislative history of section 544(b) which expresses an intent by Congress to give
 9 extraterritorial effect to section 544(b). Accordingly, it is legally improper to apply section
 10 544(b) (and through section 544(b), California's fraudulent conveyance statutes) to a transfers of
 11 real property which occurred in Mexico and pursuant to Mexican law. Bankruptcy Code section
 12 544(b) does not apply to those transfers because the transfers occurred outside the territorial
 13 limits of the United States.

14 4. The Judgment Should Be Reversed In That It Disregards Mexico's
 15 Calvo Doctrine.

16 The decision in this case essentially strips Mexican citizens of their title to land in Mexico
 17 which they legally acquired, in Mexico, pursuant to Mexican law. Mexico has a strong policy
 18 against allowing foreign powers to decide issues affecting ownership of real property in Mexico,
 19 and particularly involving Mexican residents. Moreover, Mexico's fraudulent conveyance law is
 20 different from U.S. law and would not have permitted the avoidance as ordered in this case. The
 21 Diaz Family believe that they have a strong case on appeal that this Court erred in refusing to
 22 abstain from entertaining the causes of action against them under the doctrine of international

23

³ Bankruptcy Code section 544(b) provides in its entirety:

24 (b) (1) Except as provided in paragraph (2), the trustee may avoid any transfer of
 25 an interest of the debtor in property or any obligation incurred by the debtor that is voidable
 26 under applicable law by a creditor holding an unsecured claim that is allowable under section 502
 27 of this title or that is not allowable only under section 502(e) of this title.

28 (2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that
 term is defined in section 548(d)(3) that is not covered under section 548(a)(1)(B), by reason of
 section 548(a)(2). Any claim by any person to recover a transferred contribution described in the
 preceding sentence under Federal or State law in a Federal or State court shall be preempted by
 the commencement of the case.

1 comity. Most particularly, the specific remedies requiring that the Villa Property be conveyed
 2 goes to far and impinges upon the exclusive jurisdiction of a foreign country.

3 Under the international comity doctrine, courts sometimes defer to the laws or interests of
 4 a foreign country and decline to exercise jurisdiction that is otherwise properly asserted. *Sarei v.*
 5 *Rio Tinto, PLC*, 456 F.3d 1069, 1086 (9th Cir. 2006). Declining to decide a question of law on
 6 the basis of international comity is a form of abstention. *Id.* at 1087.

7 Analysis of comity often begins with the definition proffered by Justice Gray in *Hilton v.*
 8 *Guyot*, 159 U.S. 113, 163-64 (1895): “‘Comity,’ in the legal sense, is neither a matter of absolute
 9 obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the
 10 recognition which one nation allows within its territory to the legislative, executive or judicial
 11 acts of another nation, having due regard both to international duty and convenience, and to the
 12 rights of its own citizens or of other persons who are under the protection of its laws.” *In re*
 13 *Maxwell*, 93 F.3d 1036, 1046 (2nd Cir. 1996). International comity guides the interpretation of
 14 statutes that might otherwise be read to apply to certain conduct. When construing a statute, the
 15 doctrine of international comity is best understood as a guide where the issues to be resolved are
 16 entangled in international relations. *Id.* at 1047. Moreover, international comity is a separate
 17 notion from the “presumption against extraterritoriality,” which requires a clear expression from
 18 Congress for a statute to reach non-domestic conduct. *Id.*

19 International comity describes two distinct doctrines. It is a canon of construction based
 20 on the principal that “An act of congress ought never to be construed to violate the law of nations
 21 if any other possible construction remains.” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764,
 22 814-15 (1993)(Scalia, J., dissenting). It is also a discretionary act of deference by a national
 23 court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state. *In re*
 24 *Maxwell*, 93 F.3d at 1047.

25 Mexico has a strong policy against allowing foreign powers to decide issues affecting
 26 ownership of real property in Mexico. Moreover, Mexico’s fraudulent conveyance law is
 27 different from U.S. law and would not permit the avoidance ordered in this case. According, this
 28

1 Court should have abstained from entertaining the causes of action against the Diaz Family under
 2 the doctrine of international comity.

3 (a) **Mexico Has a Strong Policy Against Allowing Foreign Powers
 4 to Decide Issues Related to Mexican Real Property.**

5 Mexico may remain as the only country in the world that still has the Calvo doctrine
 6 embodied in its Constitution. Pursuant to Article 27 of the Mexican Constitution, the Mexican
 7 State may grant to foreigners the same right conferred to Mexican nationals of acquiring real
 8 property:

9 provided they agree before the Ministry of Foreign Relations to consider
 10 themselves as nationals in respect to such property, and bind themselves not to
 11 invoke the protection of their governments in matters relating thereto; under
 12 penalty, in case of noncompliance with this agreement, of forfeiture of the
 13 property acquired to the Nation.

14 *Mexican Constitution, Article 27.⁴* Article 773 of the Mexican Federal Civil Code provides:

15 All foreign individuals and corporations are required to observe the provisions of
 16 Article 27 of the Constitution of the United Mexican States and its organic laws
 17 and rules upon acquiring real property within the Mexican republic.

18 *Mexican Federal Civil Code, Article 773. Id. at Appendix "B" (Mexican Civil Code Annotated,
 19 Jorge A. Vargas, West Group Publishing 2005 ed.).*

20 Each of the escrituras (deeds under Mexican law) in the chain of title to the Diaz's real
 21 property that created the rights of the Debtors, Howell & Gardner Investors, Inc., and the Diaz
 22 Family reflect the policy under Mexican law that title to Mexican real estate be controlled only
 23 by Mexican law and Mexican courts. For example, the escritura for the transfer from the Debtor
 24 to Howell & Gardner Investors states:

25 — JURISDICTION AND COMPETENCE —

26 For everything relative to the Interpretation and compliance of this agreement, the parties expressly submit to the Laws and Tribunals of the City of
Guadalajara, Jalisco or Mexico, Federal District at the option of the Trustee,
waiving any other jurisdiction that due to their addresses they would currently
 27 have or in the future; they also accept to be considered as Mexicans, in regards to
 28 the rights derived from this agreement, and that they will not invoke therefore

29
 30 ⁴ An English translation of Article 27 is attached as Appendix "A" to Appendix Exh. 7,
 31 Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Subject
 32 Matter Jurisdiction filed November 29, 2006. See also, *Mexican Law: a Treatise for Legal*
33 Practitioners and International Investors, § 41.29, *Jorge A. Vargas, West Group Publishing 2001*
 34 *ed.* This policy is carried over into the Mexican Federal Civil Code.

the protection of their Government, in case of breaching this agreement, they would forfeit in favor of Mexico, the rights acquired.

See Appendix, Exhibit 8, Declaration of Fletcher W. Paddison, dated November 29, 2006, at Exhibit "3" (emphasis added). As this Court is aware, virtually all of the relevant escrituras contain provisions in which the parties expressly submit to the laws and courts of Mexico and expressly waive all other jurisdictions that the parties may have access to due to their addresses. *Id.* at Exhibits "1" through "6."

The strong overriding policy under Mexican law, as embodied in Mexico's Constitution, that issues regarding Mexican real property be decided only under Mexican law and only by Mexican courts, should have guided the Judgment in this case. Instead, the Judgment awards coastal property located in Mexico and owned by Mexican citizens to Kismet, a shell corporation set up by German Citizens to gain access to the U.S. Court System, which was unsuccessful in otherwise purchasing the Diaz Family's property. When Kismet's principals, the Hahn Brothers, learned of the lawsuit filed by the Trustee in this case, they purchased the claim of the Lonie Creditors and then the avoidance claims of the Trustee. The use of the laws and the courts of the United States by foreign nationals to involuntarily strip their Mexican neighbors of their land in Mexico, something that they could never do under Mexican law, is improper. This use of the laws and courts of a foreign country, in direct contravention of the Mexican Constitution, should not have been condoned by this Court.

(b) Mexican Fraudulent Conveyance Laws Differ From those in the United States.

Creditors who have claims against people who have transferred their Mexican real property to the prejudice of their creditors are not without a remedy. Mexican law provides for the recovery of fraudulent conveyances. Creditors can resort to Mexican courts when the fraudulent conveyance involves Mexican real property.

Significant differences exist between Mexican fraudulent conveyance law and fraudulent conveyance law under California law or the Bankruptcy Code. Mexico's fraudulent conveyance law is set forth in Articles 2163 through 2179 of the Mexican Federal Civil Code. Appendix, Exhibit 7, English translation of those Articles attached as Appendix C to Memorandum of Points

1 and Authorities in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction filed
 2 November 29, 2006 (reprinted from *Mexican Civil Code Annotated*, Jorge A. Vargas, West
 3 Group Publishing 2005 ed.).

4 Transfers made without consideration may be voided under Mexican law even if the
 5 parties acted in good faith. (*Mexican Federal Civil Code, Article 2165*.) However, if a transferee
 6 has paid consideration for a transfer, the transfer can only be avoided if there is bad faith on the
 7 part of both the debtor and the third party contracting with him. (*Mexican Federal Civil Code*,
 8 *Article 2164*.) Mexican law does not provide for the avoidance of a transfer made to a good faith
 9 transferee who paid value for the transfer even if the consideration was less than reasonably
 10 equivalent value. Moreover, a creditor's right of action against a first purchaser is not available
 11 against a subsequent holder, unless the subsequent holder acquired the property in bad faith.
 12 (*Mexican Federal Civil Code, Article 2167*.)

13 Mexico has its own fraudulent conveyance laws which protect creditors. Those laws
 14 differ from the fraudulent conveyance laws in the United States. It is therefore inappropriate for
 15 fraudulent conveyance issues regarding the transfer of real estate located in Mexico to be decided
 16 using the laws and courts of a foreign country (i.e., the U.S.), when Mexico's own laws and
 17 courts provide sufficient protection to creditors. These issues should have been deferred to the
 18 jurisdiction of the Mexican courts for determination pursuant to Mexican law.

19 **B. The Diaz Family Will Suffer Irreparable Harm**

20 "A showing of irreparable harm is the principal prerequisite for the issuance of a [Rule
 21 8005] Stay." *Rothenberg v. Ralph D. Kaiser Co.*, 2007 B.R. 461, 463 (D.D.C. 1996). Under this
 22 test, the moving party must demonstrate that such injury is likely before the other requirements
 23 will be considered. *In re Bridgeport*, 132 B.R. 81, 83 (Bankr. D.Conn. 1991). Irreparable harm
 24 must be "neither remote nor speculative, but actual and imminent." *Tucker Anthony Realty Corp.*
 25 v. *Schlesinger* 888 F.2d 969, 975 (2d Cir. 1989). *In re Issa Corp.*, 142 Bankr. 75, 78 (Bankr.
 26 S.D.N.Y. 1992) (recognizing that where debtor-restauranteur stands to be evicted from the
 27 premises, and thereby lose its restaurant, the debtor will "indisputably" suffer irreparable harm);
 28 *In re Slater*, 200 B.R. 491, 495 (E.D.N.Y. 1996) (Chapter 13 debtor would suffer irreparable

1 harm if evicted from home). Most particularly when real property is involved, irreparable harm
 2 is established because "monetary relief fails to provide adequate compensation for any interest in
 3 real property, which by its very nature unique, which money damages may not adequately
 4 compensate." See e.g. *O'Hagan v. U.S.*, 86 F.3d 776,783 (8th Cir. 1996).

5 The risk that an appeal might become moot in the absence of a stay pending appeal may
 6 satisfy the irreparable injury requirements. Several courts have held that mooting any appeal "is
 7 a quintessential form of prejudice." *In re Adelphia Communications Corp.* 361 B.R. 337, 347-48
 8 (S.D.N.Y. 2007); *In re Country Squire Associates of Carle Place, L.P.* 203 B.R. 182, 183 (2nd
 9 Cir. 1996) (staying a foreclosure sale where it was "apparent that absent a stay pending appeal . . .
 10 . the appeal will be rendered moot," resulting in a "quintessential form of prejudice" to
 11 appellant); *In re Advanced Mining Sys. Inc.*, 173 B.R. 467, 468-69 (S.D.N.Y. 1994) (finding
 12 irreparable injury where prong met where, absent a stay of the bankruptcy court's order, the
 13 distribution of assets to creditors would moot any appeal and thus quintessentially prejudice
 14 appellants). The fact is that loss of appellate rights is a "quintessential form of prejudice." Thus,
 15 where the denial of a stay pending appeal risks mooting any appeal of significant claims of error,
 16 the irreparable harm requirement is satisfied. Consequently, in evaluating the irreparable harm
 17 element, it is necessary to analyze the risk that an appeal would be mooted in the absence of a
 18 stay. *In re Adelphia Communications Corp.*, 361 B.R. 337, 348 (S.D.N.Y. 2007).

19 Here, the Villa Property is indisputably unique and requiring the Diaz Family to turn over
 20 their vacation home would be tantamount to evicting them from it. Moreover, if they are forced
 21 to turn over the property prior to a determination by the Court of Appeals, the appeal will
 22 potentially become moot and the Diaz Family will be left without a remedy to address the
 23 findings by the Bankruptcy Court. Accordingly, under the case law cited above, the Diaz Family
 24 has satisfied the requirement that they will be irreparably harmed absent a stay.

25 **C. The Kismet Plaintiffs Will Not Suffer Substantial Harm if the Stay is Granted**

26 In addition to showing irreparable harm, the party seeking a stay must also establish that
 27 the non-moving party or other parties will not suffer substantial harm if the stay is granted. *In re*
 28 *Adelphia Communications Corp.*, 361 B.R. 337, 349 (S.D.N.Y. 2007); *Mohammed*, 309 F.3d at

1 100. In other words, the moving party must show that the balance of harms tips in favor of
 2 granting the stay. *Bermudez v. Reid*, 720 F.2d 748, 750 (2d Cir. 1983). In this case, there will be
 3 no substantial harm or prejudice to the Kismet Plaintiffs if the judgment is stayed. There is no
 4 risk of the Villa Property being sold or transferred since it is still subject to the Court's
 5 injunction. Furthermore, Wolfgang Hahn testified at trial that the Villa Property was not
 6 necessary for his development and that it was "nothing special" but "just another property on a
 7 hill". So a stay will not hold up the Kismet Plaintiffs' development project. Accordingly, the
 8 balance of harms tips in favor of the Diaz Family and a stay is in order.

9 **D. Public Interest Considerations Mandate the Issuance of a Stay**

10 Lastly, the party seeking stay must also establish that the public interest will be served by
 11 granting the stay. Case law signals a preference in favor of maintaining the status quo. *Feller v.*
 12 *Brock*, 802 F.2d 722, 727 (4th Cir.1986); Although satisfaction of debts is no doubt supported by
 13 public interest, even stronger is the policy against potentially unnecessary forfeiture of homes and
 14 disturbance of the status quo. *In re Skinner* 202 B.R. 867, 869 (W.D.Va.,1996); *In re County*
 15 *Squire Assocs. Of Carle Place, L.P.* 203 B.R. 182 (B.A.P. 2d Cir. 1996).

16 In this case, the public interest will not be served by denying the stay. The status quo will
 17 be disturbed and the Diaz Family will be forced to forfeit their home. Therefore, granting the
 18 stay will be in accordance with public policy against such a drastic result.

19 **IV.**

20 **THE COURT HAS DISCRETION TO REQUIRE A BOND**

21 Bankruptcy Rule 8005 provides in relevant part that the "[t]he district court ... may
 22 condition the relief it grants under this rule on the filing of a bond or other appropriate security
 23 with the bankruptcy court." *In re Sphere Holding Corp.*, 162 B.R. 639, 644
 24 (Bankr.E.D.N.Y.1994); *In re Max Sugarman Funeral Home, Inc.*, 94 B.R. 16, 17
 25 (Bankr.D.R.I.1988) ("[T]he form, the amount, and the sufficiency of the bond generally[] are
 26 matters within the discretion of and for determination by the bankruptcy court.") (citing *In re*
 27 *Swift Aire Lines, Inc.*, 21 B.R. 12, 14 (9th Cir. BAP 1982)).

28

In determining whether a bond should be ordered, the court looks to whether the bond would be necessary to protect “against diminution in the value of property pending appeal” and to “secure the prevailing party against any loss that might be sustained as a result of an ineffectual appeal.” *In re Sphere Holding Corp.* 164 B.R. at 644. Moreover, the posting of a bond “guarantees the costs of delay incident to the appeal.” *In re Suprema Specialties*, 330 B.R. at 96 (declining to impose a bond, but stating that if the say would have delayed payment to creditors, ‘a bond should be required to guarantee the costs of delay incident to the appeal’). In analyzing whether to order movants to post a bond in support of a stay pending an appeal of a bankruptcy court order, district courts have obtained guidance from Federal Rule of Civil Procedure 62(d). *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 124 F.R.D. 613, 614 (E.D. Tenn. 1988) (bond required unless appellant can show “undue financial burden or other exceptional circumstances”). *In re Adelphia Communications Corp.* 361 B.R. 337, 350 (S.D.N.Y., 2007).

13 Here, by virtue of the injunction on the Villa Property already issued by the Bankruptcy
14 Court, there is no risk that the property will be transferred pending resolution of an appeal.
15 Further, there is no evidence that the Villa Property is at risk with regard to diminution in value.
16 Therefore, to the extent this court deems a bond to be necessary, the Diaz Family believes that
17 any such bond should be minimal.

V

19 **THE DIAZ FAMILY IS ENTITLED TO A STAY AS A MATTER OF RIGHT IF IT**
20 **POSTS A BOND**

Generally, Rule 7062, which incorporates Rule 62(d) of the Federal Rules of Civil Procedure, provides an automatic stay upon filing a supersedeas bond in cases of money judgments. *In re Capital West Investors*, 180 B.R. 240, 242 (N.D. Cal. 1995).

When an appeal is taken from a judgment that is not a money judgment, but is comparable to one or the other of these judgments, most of the few courts that have addressed the issue appear (for purposes of Rule 62) to treat that judgment like the judgment to which it is comparable. *In re Capital West Investors*, 180 B.R. 240, 243 (N.D. Cal. 1995). For example, in *Hebert v. Exxon Corp.* 953 F.2d 936, 938 (5th Cir. 1992), the Fifth Circuit found no meaningful

1 distinction between a judgment for declaratory relief and a money judgment, and held that a
 2 money judgment in the form of declaratory judgment constitutes a money judgment for purposes
 3 of Rule 62(d). *See also United States v. Mansion House Center Redevelopment Co.*, 682 F.Supp.
 4 446, 450 (E.D. Mo. 1988) (treating a mortgage foreclosure judgment like a money judgment for
 5 purposes of Rule 62(d)). Under Bankruptcy Rule 7062 and FED.R.CIV.P. 62(d), a stay is a
 6 matter of right where an interest in property is determined by the judgment. *In re Max Sugarman*
 7 *Funeral Home, Inc.* 94 B.R. 16, 16-17 (Bkrtcy.D.R.I.,1988).

8 In California, appellants in all actions pertaining to possession of real property, other than
 9 unlawful detainer actions, are entitled to a stay pending appeal as a matter of right, upon posting
 10 a bond under California Code of Civil Procedure section 917.4. *Goldie's Bookstore, Inc. v.*
 11 *Superior Court of State of Cal.*, 739 F.2d 466, 468 (9th Cir. 1984) ("Section 917.4 of the
 12 California Code of Civil Procedure grants to all non-tenant occupants of real property an
 13 automatic stay of an adverse judgment pending appeal.")

14 Under the relevant case law cited above, if the Diaz Family is willing and able to post a
 15 bond, it is entitled to a stay of the judgment as a matter of right. Therefore, if the Court is
 16 unwilling to grant a discretionary stay without a bond, it must set the amount of the bond in
 17 accordance with Federal Rule of Bankruptcy Procedure 7062(d).

18 VI.

19 **CONCLUSION**

20 In light of the foregoing, Defendants Martha Margarita Barba de la Torre and Alejandro
 21 Diaz-Barba respectfully request the Court (A) to grant a discretionary stay of the judgment in
 22 these cases without requiring a bond or, in the alternative, set the amount of the bond that will be
 23 required to be posted.

24 DATED: July 31, 2008

25 PROCOPIO, CORY, HARGREAVES
 & SAVITCH, LLP

26

27

28

By: /s/ Geraldine A. Valdez

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Attorneys Defendants

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Martha Margarita Barba de la Torre

25

Bkr. No. 03-11155-LA7

Adv. Proc. No. 06-90369; 04-90392

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 13 automatic stay of an adverse judgment pending appeal.")

14 Under the relevant case law cited above, if the Diaz Family is willing and able to post a
 15 bond, it is entitled to a stay of the judgment as a matter of right. Therefore, if the Court is
 16 unwilling to grant a discretionary stay without a bond, it must set the amount of the bond in
 17 accordance with Federal Rule of Bankruptcy Procedure 7062(d).

18 **VI.**

19 **CONCLUSION**

20 In light of the foregoing, Defendants Martha Margarita Barba de la Torre and Alejandro
 21 Diaz-Barba respectfully request the Court (A) to grant a discretionary stay of the judgment in
 22 these cases without requiring a bond or, in the alternative, set the amount of the bond that will be
 23 required to be posted.

24 DATED: August 6, 2008.

25 **PROCOPIO, CORY, HARGREAVES
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24 11:20
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26 AUG - 7 2008

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 10 Martha Margarita Barba de la Torre

11 HAROLD S. MARENUS, CLERK
 12 U. S. BKCY. APP. PANEL
 13 OF THE NINTH CIRCUIT

14 UNITED STATES BANKRUPTCY APPELLATE PANEL

15 OF THE NINTH CIRCUIT

16 In re:

17 BAP No. SC-08-1190

18 JERRY LEE ICENHOWER dba Seaview
 19 Properties, and DONNA LEE ICENHOWER,

20 Bankruptcy Court (S.D. Cal.)

21 Debtors

22 Case No. 03-11155-LA7

23 ALEJANDRO DIAZ-BARBA;
 24 MARTHA MARGARITA BARBA DE LA TORRE

25 Adv. Proc. No.: 06-90369
 26 Adv. Proc. No.: 04-90392

27 **PROOF OF SERVICE**

28 Appellant,

v.

KISMET ACQUISITION, LLC

Appellee.

29 I am a resident of the State of California, over the age of eighteen years, and not a party to
 30 the within action. My business address is Procopio, Cory Hargreaves & Savitch LLP, 530 "B"
 31 Street, Suite 2100, San Diego, California 92101. On August 6, 2008 in this action I served the
 32 following document(s) described as:

- 33 1. **EMERGENCY MOTION OF DEFENDANTS MARTHA MARGARITA**
 34 **BARBA DE LA TORRE AND ALEJANDRO DIAZ-BARBA FOR STAY OF**
 35 **JUDGMENT PENDING APPEAL;**

36 Bk. No. 03-11155-LA7

37 Adv. Proc. No. 06-90369; 04-90392

- 1 2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
 2 **EMERGENCY MOTION OF DEFENDANTS MARTHA MARGARITA**
 3 **BARBA DE LA TORRE AND ALEJANDRO DIAZ-BARBA FOR STAY OF**
 4 **JUDGMENT PENDING APPEAL; and**
 5 3. **APPENDIX IN SUPPORT OF EMERGENCY MOTION OF DEFENDANTS**
 6 **MARTHA MARGARITA BARBA DE LA TORRE AND ALEJANDRO**
 7 **DIAZ-BARBA FOR STAY OF JUDGMENT PENDING APPEAL**

8 _____ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth
 9 below on this date before 5:00 p.m. A copy of the transmission confirmation report is
 10 attached hereto.

11 _____ by placing the document(s) listed above in a sealed envelope with postage thereon fully
 12 prepaid, in the United States mail at San Diego, California addressed as set forth below. I
 13 am readily familiar with the firm's practice of collection and processing correspondence
 14 for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the
 15 same day with postage thereon fully prepaid in the ordinary course of business. I am
 16 aware that on motion of the party served, service is presumed invalid if postal
 17 cancellation date or postage meter date is more than one day after date of deposit for
 18 mailing an affidavit. (SEE ATTACHED MAILING LIST.)

19 ~~XX~~ by placing the document(s) listed above in a sealed overnight envelope and depositing it
 20 for overnight delivery at San Diego, California, addressed as set forth below. I am readily
 21 familiar with the practice of this firm for collection and processing of correspondence for
 22 processing by overnight mail. Pursuant to this practice, correspondence would be
 23 deposited in the overnight box located at 530 "B" Street, San Diego, California 92101 in
 24 the ordinary course of business on the date of this declaration.

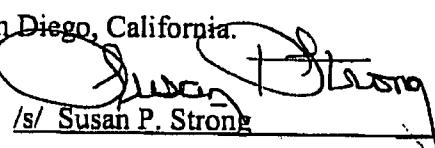
25 _____ by personally delivering the document(s) listed above to the person(s) at the address(es)
 26 set forth below.

27 _____ by electronic mail to the following:

28 _____ (State) I declare under penalty of perjury under the laws of the State of California that the
 29 forgoing is true and correct.

30 ~~XX~~ (Federal) I declare that I am employed in the office of a member of the bar of this court at
 31 whose direction the service was made and declare under penalty of perjury under the laws
 32 of the United States that the foregoing is true and correct.

33 Executed on August 6, 2008, at San Diego, California.

34 
 35 _____
 36 /s/ Susan P. Strong

37

38

39

40

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